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## The Right to Investigate and New York's "Stop and Frisk" Law

### Cover Page Footnote

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# THE RIGHT TO INVESTIGATE AND NEW YORK'S "STOP AND FRISK" LAW

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## I. INTRODUCTION

THE power and duty of the police to investigate crime has never been seriously questioned. However, the distinction between investigation and arrest, or the point at which an investigation ends and an arrest takes place, has never been adequately defined, particularly by the courts of New York. The possibility that an investigation was in progress, rather than an arrest, has been overlooked in most criminal cases involving the question of the existence of probable cause for an arrest.<sup>1</sup>

The New York State legislature amended the Code of Criminal Procedure in 1964 to include a new section entitled "Temporary questioning of persons in public places; search for weapons," which authorizes the stopping and questioning of persons whom the police reasonably suspect of the commission of crime. The statute, which became effective on July 1, 1964, states:

1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.
2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed or arrest such person.<sup>2</sup>

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1. The dearth of authority in point is undoubtedly due to the long-standing rule of *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926), which admitted evidence even though illegally seized. Prior to the imposition of the exclusionary rule of *Mapp v. Ohio*, 367 U.S. 643 (1961), there was little point in discussing whether there was probable cause for an arrest prior to the search which disclosed the evidence, since the evidence seized could be used to justify the arrest. For this reason, the present effect of pre-Mapp decisions may be questioned. In any event, few defendants challenged the right of a police officer to stop and talk to them on the public streets. The question usually arose as an issue in the defense of a charge of assault for resisting an illegal arrest. *People v. Cherry*, 307 N.Y. 308, 121 N.E.2d 238 (1954); *People v. Dreares*, 15 App. Div. 2d 204, 221 N.Y.S.2d 819 (1st Dep't 1961), aff'd mem. 11 N.Y.2d 906, 182 N.E.2d 812, 228 N.Y.S.2d 467 (1962). However the question of investigation versus arrest was not fully considered in these cases, but rather the issue turned on whether there was probable cause for arrest at the instant of stopping.

2. N.Y. Code Crim. Proc. § 180-a.

This enactment is substantially similar to two subsections of the Uniform Arrest Act, prepared by the Interstate Commission on Crime in 1939.<sup>3</sup> It was submitted to the legislature by the Mayor's legislative representative at the request of the Police Department of the City of New York.<sup>4</sup> The original proposal included four subsections of the Uniform Arrest Act, including subsections 2 and 3 of section 2 of the original act, authorizing further detention up to a period of two hours if the person questioned fails to identify himself or explain his actions. However, the bill introduced and passed in the Assembly<sup>5</sup> and Senate<sup>6</sup> omitted these subdivisions.

The right of the police to temporarily detain a person during an investigation will be squarely presented in the interpretation of the new statute. The need for clarifying legislation was made necessary by the conflict in case law. Unfortunately, it is more than a simple conflict. Basically, the problem is an avoidance of the issue of whether there was an arrest or whether the process of investigation was still under way. Although there are no clear-cut classifications, there are two general schools of thought exemplified in case law. The first ignores the question of investigation and, in effect, holds that it is the operation of the defendant's mind which determines whether there was an arrest. As soon as the defendant feels that his liberty is constrained, there is an arrest.<sup>7</sup> Some courts then go to great lengths to find probable cause existing at that instant to justify the arrest.<sup>8</sup> At other times, however, courts have held that no probable cause existed and, in similar circumstances, the arrest was illegal because the officer did not have enough evidence for conviction at the instant of the arrest.<sup>9</sup>

The other school of thought holds that the statutory definition of an arrest must be made out before there can be an arrest. That is, the person must be taken into custody that he may be held to answer for a crime.<sup>10</sup> This school recognizes the possibility of a period of investigation and indicates that it is the operation of the arresting officer's mind which determines whether there was a temporary detention or an arrest and

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3. Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 343-47 (1942).

4. Ruggieri, *Memorandum in Support of '64 Police #1*, Office of the Mayor, City of New York.

5. Ass. Intro. No. 1859, Pr. No. 1860, N.Y. State Leg. 187th Sess. (1964).

6. Sen. Intro. No. 1207, Pr. No. 1214, N.Y. State Leg. 187th Sess. (1964).

7. *Henry v. United States*, 361 U.S. 98 (1959); *Limbeck v. Gerry*, 15 Misc. 663, 668, 39 N.Y. Supp. 95, 97 (Sup. Ct. 1896).

8. *People v. Foster*, 10 N.Y.2d 99, 176 N.E.2d 397, 217 N.Y.S.2d 596 (1961); *People v. Esposito*, 118 Misc. 867, 194 N.Y. Supp. 326 (Ct. Spec. Sess. 1922).

9. *People v. Moore*, 11 N.Y.2d 271, 183 N.E.2d 225, 228 N.Y.S.2d 822 (1962).

10. *People v. Marendi*, 213 N.Y. 600, 608, 107 N.E. 1058, 1060 (1915); *Hook v. New York*, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958) (memorandum decision).

the precise moment of the arrest. Of course, this school requires that the facts and circumstances justify the inner operation of the officer's mind to find probable cause for both the detention and the arrest if it should follow.<sup>11</sup>

These rulings represent a wavering attempt to strike some balance between the public interest in the prevention of crime and the speedy apprehension of criminals, and the right of the individual to his personal freedom from undue interference by law-enforcement agencies. Decisions on the law of arrest, particularly when they allow obviously guilty persons to escape justice, have been the subject of vigorous criticism.<sup>12</sup> The enactment by the legislature of the "stop and frisk" law has resulted in equally vigorous criticism by bar associations and by civil rights organizations.<sup>13</sup>

The use of the word "suspects" in the statute has caused considerable alarm to the opponents of the new law. The fact that the statute uses the words "*reasonably* suspects" has not deterred them from reaching the conclusion that the law is unconstitutional as authorizing a general search or stopping and searching upon mere suspicion. If the new statute permitted a "general search" or stopping, or questioning and searching on "mere suspicion" or "pure rumor," it is quite probable that it would be unconstitutional.<sup>14</sup> However, many experts have decided that this law is unconstitutional without examining recent case law as well as common law precedents. Such a decision may be unduly hasty.

## II. COMMON LAW RIGHT OF INVESTIGATION

The law of arrest as it is known today can be traced to the English common law. Although the common law of arrest had very strict rules, it may be a surprise to many to learn that there were provisions in early English statutes and holdings in cases allowing constables and the night watch to detain "suspicious night walkers." Two English authorities on the common law, Sir Matthew Hale<sup>15</sup> and William Hawkins,<sup>16</sup> have indicated that the power of the night watch and of constables to detain suspicious persons was usually limited to the hours of darkness. They had the power to detain such persons until morning. At this time they were released if no crime was found. If there were grounds for holding them, they were turned over to the sheriff.

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11. *United States v. Bonanno*, 180 F. Supp. 71, 80 (S.D.N.Y. 1960).

12. See, e.g., *Prosser, Torts* 111 (2d ed. 1955) and commentaries cited therein.

13. See *N.Y. Times*, March 9, 1964, p. 8, col. 1.

14. Cf. *Henry v. United States*, 361 U.S. 98, 104 (1959); *People v. Coffey*, 12 N.Y.2d 443, 452, 191 N.E.2d 263, 267, 240 N.Y.S.2d 721, 726 (1963).

15. Hale, *Pleas of the Crown* 88, 97 (Wilson ed. 1800).

16. 2 Hawkins, *Pleas of the Crown* 164, 173 (7th ed. 1795).

Thus, in a civil action for false imprisonment brought by a person who had been stopped by the night watch because he was carrying a bundle at night,<sup>17</sup> an English court in the year 1810 stated:

[I]n the night, when the town is to be asleep, and it is the especial duty of these watchmen, and other officers, to guard against malefactors, it is highly necessary that they should have such a power of detention. And, in this case, what do you talk of groundless suspicion? There was abundant ground of suspicion here. We should be very sorry if the law were otherwise.<sup>18</sup>

Apparently the use of the word "suspicion" in connection with stopping and questioning by police officers was also known in early English common law. It is also apparent that "mere suspicion" or "groundless suspicion" was not enough to justify detention by the night watch. An earlier English case, *Queen v. Tooley*,<sup>19</sup> was even more explicit in stating a rule which is as appropriate in our present problem of interpretation of the new statute as it was in the year 1709. With regard to the power of a constable to stop persons abroad at night the court said, "it is not the constable's suspecting, that will justify his taking up a person, but it must be just grounds of suspicion. . . ."<sup>20</sup>

It is evident that there is ample precedent in English common law and statutory law for the use of the word "suspicion" in connection with the detention and search of suspects upon reasonable suspicion. The Metropolitan Police Act of 1839<sup>21</sup> authorized the London Police to search vessels and carriages on reasonable suspicion that they were being used to convey stolen goods, and also to search persons who may be reasonably suspected of such possession.<sup>22</sup> This authority is used extensively by the London Police today. The London Police, who have been proclaimed as models for American police agencies, have been stopping several hundred thousand people a year and asking to see the contents of bags they are carrying or inquiring as to the possession of other property which might have been stolen.<sup>23</sup>

The fact that a practice was accepted under early English common law and still exists today in England does not, of course, mean that it is good law under the United States Constitution or even under the New York State Constitution. It does, however, indicate some precedent for the new statute and does show that the use of the word "suspicion," with the

17. *Lawrence v. Hedger*, 3 Taunt. 14, 128 Eng. Rep. 6 (1810).

18. *Id.* at 16, 128 Eng. Rep. at 7.

19. 2 T. Raym. 1296, 92 Eng. Rep. 349 (1709), overruled, *Queen v. Davis*, L. & C. 64, 71, 169 Eng. Rep. 1305, 1308 (1861).

20. *Id.* at 1301, 92 Eng. Rep. at 352.

21. 2 & 3 Vict., c. 47, § 66.

22. *Williams, Police Detention and Arrest Privileges—England*, 51 J. Crim. L., C. & P.S. 413, 418 (1960).

23. *Ibid.*

qualification of just grounds for suspicion, is not a novelty in the criminal law.

### III. THE LAW IN OTHER STATES: THE UNIFORM ARREST ACT

The Uniform Arrest Act, from which the New York stop and frisk law was derived, was adopted in New Hampshire<sup>24</sup> and Rhode Island<sup>25</sup> in 1941. It was enacted into law in Delaware<sup>26</sup> in 1951.

The provisions of the Uniform Arrest Act are substantially similar to the New York statute in the two subsections of the act which New York has adopted. The Uniform Act is broader in scope in that it authorizes stopping for *all* crimes while the New York law permits stopping only for felonies and certain misdemeanors, such as possession of dangerous weapons, burglar's tools, etc.<sup>27</sup> Other states and some cities have likewise enacted similar statutes although they have not adopted the Uniform Act.<sup>28</sup>

#### A. Detention Statutes

Delaware has three noteworthy cases on the question of stopping and questioning or temporary detention for investigation. One of these, *State*

24. N.H. Laws 1941, ch. 163, §§ 1-13, presently contained in N.H. Rev. Stat. Ann. §§ 594:1-594:23 (1955).

25. R.I. Pub. Laws Jan. Sess. 1941, ch. 982, §§ 1-2, presently contained in R.I. Gen. Laws Ann. §§ 12-7-1 to 12-7-17 (1956). The language of the Uniform Act has varied slightly as adopted in the three states which have enacted it in toto. Rhode Island and New Hampshire use the words "reason to suspect," while Delaware's version reads "reasonable ground" to suspect. Compare N.H. Rev. Stat. Ann. § 594:2 (1955) and R.I. Gen. Laws Ann. § 12-7-1 (1956) with Del. Code Ann. tit. 11, § 1902 (1953).

26. 48 Laws of Delaware 116th Sess. ch. 304 (1951), presently contained in Del. Code Ann. tit. 11, §§ 1901-1912 (1953).

27. Subdivision 1 of § 2 of the Uniform Act states: "A peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime . . ." Warner, *supra* note 3, at 344. The New York Act uses the words: "whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty two of this chapter . . ." N.Y. Code Crim. Proc. § 180-a(1). Subdivisions 2 and 3 of § 2 of the Uniform Arrest Act authorize the detention of any person questioned who fails to identify himself, for a period of up to two hours, while further investigation takes place. Warner, *The Uniform Arrest Act*, *supra* note 3, at 344. The New York statute is silent as to what may be done if the person fails or refuses to identify himself or as to how long a person may be detained. Section 3 of the Uniform Arrest Act (*Ibid.*) is practically identical with § 2 of the New York law, which authorizes the search for dangerous weapons. N.Y. Code Crim. Proc. § 180-a(2).

28. E.g., Cal. Pen. Code § 833 (1957); Ill. Rev. Stat. ch. 38, § 657 (1961); Mass. Gen. Laws ch. 41, § 98 (1932); Mo. Rev. Stat. §§ 84.090, 84.440 (1959); Wis. Stat. § 954.03 (1961). Although the Massachusetts act was enacted in 1932 and used by the police since that time, it was not until this year that the Massachusetts Supreme Judicial Court upheld its constitutionality as a valid exercise of police power. *Commonwealth v. Lehan*, 32 U.S.L. Week 2516 (Mass. March 6, 1964).

*v. Gulczynski*,<sup>29</sup> was tried in 1922, long before the passage of the Uniform Act. It is of interest, however, for its holding on the right of the police to stop and question a person on the street. Defendant, at his trial for illegal possession of liquor, moved for the return or destruction of the liquor contending it was illegally seized, since he had been placed under arrest without probable cause. The court denied his motion because he was not arrested until after he admitted having the liquor.<sup>30</sup>

The court pointed out that although a person may not be arrested on suspicion, information or mere belief, an officer may approach and question a suspect without having his action constitute an arrest.<sup>31</sup> The court discussed what *would* constitute an arrest and stated that it was not necessary that an officer place his hand on the accused or otherwise take possession of his person.<sup>32</sup> Under Delaware law, however, the officer must do or say something from which the accused can reasonably believe that he is under arrest. He must have reasonable ground to believe that he cannot go away or that his liberty is restrained.<sup>33</sup>

In *De Salvatore v. State*,<sup>34</sup> decided after the passage of the Uniform Arrest Act in Delaware, the Supreme Court of Delaware held that the act was constitutional even though it permitted detention "upon reasonable grounds to suspect" rather than "reasonable grounds to believe." The appellant argued that the Uniform Arrest Act was unconstitutional because it permitted an officer to stop any person whom he has "reasonable ground to suspect" has committed a crime as distinguished from "reasonable ground to believe," which he maintained was the constitutional requirement for lawful detention and arrest without a warrant. The appellant contended that arrests or detentions without a warrant are constitutional only when made on "probable cause" and not on "mere

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29. 32 Del. 120, 120 Atl. 88 (Ct. Gen. Sess. 1922). The police had information that defendant was transporting illegal liquor to his store. A uniformed police officer saw him walking near his store carrying two containers wrapped in paper. When approached and questioned as to the contents of the package, defendant replied, "what do you want to know for?" The question was repeated and the same answer received. The policeman called for another officer and again repeated the question. This time the defendant admitted that he had two gallons of liquor. He was then placed under arrest and the liquor seized as evidence.

30. *Id.* at 124-25, 120 Atl. at 90.

31. *Id.* at 123, 120 Atl. at 89.

32. *Ibid.*

33. *Ibid.*

34. 52 Del. 550, 163 A.2d 244 (1960). The defendant in this case had been placed under a two-hour detention for the purpose of a chemical test to determine whether he had been intoxicated while driving. The officers had observed him commit a traffic violation. In light of his appearance and actions, they concluded that he should be given a sobriety test. The defendant agreed to take the test, the results of which showed a percentage of alcohol in the blood stream above the critical limit. He was then formally placed under arrest.



suspicion." The court agreed that he was correct in arguing that arrests made without a warrant may be made only upon probable cause, but pointed out that the act provides for a new category of detention in the course of the investigation of crime which is not an arrest.<sup>35</sup> The court characterized the appellant's attempt to draw a distinction between reasonable ground to believe and reasonable ground to suspect as a semantic quibble.<sup>36</sup>

This case has been interpreted by some writers as holding that there is no difference between detention under the act and arrest, and that there is no difference in the probable cause necessary to arrest or to detain under the Uniform Act.<sup>37</sup> However, a careful reading of the case indicates that the court used the term "probable cause" in ruling that the new statute provided for the requirement of reasonable grounds for detention because of the issue raised by the defendant that it was unconstitutional in permitting detention upon mere suspicion. The court stated in its opinion that the act is constitutional because it does not permit detention upon mere suspicion but "as appellant says upon probable cause."<sup>38</sup> Whether the "probable cause" necessary for detention requires the same quantum of facts and circumstances necessary for probable cause for an arrest, the court does not make clear. It seems that this could only be determined upon the facts and circumstances of each case. However, no court has been able to fashion an exact measure of probable cause which will suit all cases and circumstances for the purpose of determining if an arrest was legal.

The opinion would have been clearer if the court had not quoted the term "probable cause" used by the appellant, but had limited itself to stating that the act was constitutional because it did not authorize an unreasonable search or seizure of the person of the appellant. According to the Supreme Court in *Brinegar v. United States*,<sup>39</sup> the substance of all of the definitions of probable cause is a "reasonable ground for belief of guilt."<sup>40</sup> The opinion of the court in *De Salvatore* applied the words "probable cause" to detention which was a new concept of use for the term.

However, the words "probable cause" were originally used in the fourth

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35. Id. at 556, 163 A.2d at 248.

36. Id. at 557, 163 A.2d at 249. This line of reasoning is also found in other jurisdictions. See *United States v. Rembert*, 284 Fed. 996 (S.D. Tex. 1922). See also Leagre, *The Fourth Amendment and the Law of Arrest*, 54 J. Crim. L., C. & P.S. 393, 412 (1963).

37. See, e.g., Foote, *The Fourth Amendment: Obstacle or Necessity in the Law of Arrest?*, 51 J. Crim. L., C. & P.S. 402, 403 (1960); Kuh, *N.Y.L.J.*, May 29, 1964, p. 4, col. 1.

38. 52 Del. at 557, 163 A.2d at 249.

39. 338 U.S. 160 (1949).

40. Id. at 175.

amendment to the Constitution in the clause referring to warrants. Since then, of course, it has been extended by interpretation to apply to all arrests and to all searches and seizures, with or without a warrant. Viewed in the light of these developments, the use of the term probable cause to refer to reasonable grounds for detention is not so unusual. The Delaware court clarified its previous ruling in *De Salvatore* in *Cannon v. State*,<sup>41</sup> holding that the Uniform Arrest Act clearly authorizes a "detention" which is not the same as an arrest. This detention upon reasonable grounds to suspect is not an unconstitutional deprivation of liberty without due process of law. The court held that the act was a reasonable exercise of the police power of the state and was constitutional.<sup>42</sup>

Rhode Island had a case in the same year, *Kavanagh v. Stenhouse*,<sup>43</sup> interpreting the detention provisions of the Uniform Arrest Act, as enacted in Rhode Island, in a civil suit for false arrest. The Rhode Island court declared that even if there were no distinction between "detention" and "arrest" at common law, the state legislature, in the exercise of its broad police powers could provide for such a distinction, if the period of detention is reasonably limited, not accompanied by unreasonable and unnecessary restraint, and is based upon circumstances reasonably suggestive of criminal involvement.<sup>44</sup> It also found that the words "reason to suspect" established a just standard for such detention as distinguished from arrest. These words connote more than mere suspicion. The circumstances must be such that the officer was warranted in concluding that reasonable grounds for detention did exist.<sup>45</sup> In this case the jury determined that the officer was justified in his conclusion upon the evidence presented. The court, however, held that detention was not equal to arrest.

An appeal from the decision of the Rhode Island court was dismissed by the United States Supreme Court with a holding that there was no federal question.<sup>46</sup> This dismissal of the appeal cannot be considered as

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41. 53 Del. 284, 168 A.2d 108 (1961).

42. *Id.* at 288, 168 A.2d at 110.

43. 174 A.2d 560 (R.I. 1961), appeal dismissed, 368 U.S. 516 (1962) (*per curiam*). Kavanagh and a companion were found at the scene of an accident, after their car crashed into a pole. They were both taken to the stationhouse because the police were not sure who was driving at the time of the accident. After further investigation, Kavanagh's companion was charged with driving while intoxicated. In a suit for false arrest, the arresting officer pleaded the Uniform Arrest Act as a defense, and the jury found for the defendant officer. Kavanagh appealed, claiming that the act was unconstitutional in that it authorized a detention rather than an arrest.

44. *Id.* at 562.

45. *Id.* at 565.

46. 368 U.S. 516 (1962) (*per curiam*).

a decision on the merits, so we have no final decision of the highest Court in the land.<sup>47</sup>

Therefore, two of the states which have adopted the Uniform Arrest Act have sustained those sections of the law which are similar to the provisions in the new statute in New York. Massachusetts, which has had a statute authorizing detention for investigation since the year 1932, has also sustained the validity of its law.<sup>48</sup> It seems remarkable that all three of the major cases in the states of Delaware and Rhode Island should be concerned with charges of driving while intoxicated. It is also remarkable that New York has had a special provision in the state Vehicle and Traffic Law since the year 1929 permitting an arrest without a warrant for the misdemeanor of driving while intoxicated coupled with an accident, even though the violation was not committed in the officer's presence.<sup>49</sup> Apparently, no one has seriously challenged the constitutionality of this statute which has authorized arrests in cases similar to *Kavanagh v. Stenhouse* for over thirty years.

#### B. *Detention in the Absence of Statutory Authorization*

The right of the police to stop and question persons while making an investigation of a crime, based upon the common law, has been upheld in several states in the absence of any statutory provisions such as the Uniform Arrest Act. A 1908 California case, *Gisske v. Sanders*,<sup>50</sup> involved a civil action for false imprisonment. The trial court rendered a decision for the plaintiff, and the police officer appealed to the California Court of Appeals which reversed the judgment of the lower court. The California court held that a police officer sent to investigate a robbery on the street late at night had the right to stop and question a person found at the scene, and, if he refused to identify or explain himself, to take him to the police station for investigation. Plaintiff had been released without charges the next day after identification and his explanation that he just happened to be passing the scene on his way home. On the way to the station house the officer had searched him to see if he had any concealed weapons. The court stated that this was a safety precaution which the

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47. Indeed, Mr. Justice Douglas would have waited for a hearing on the merits before resolving whether there was a federal question. *Ibid.*

48. *Commonwealth v. Lehan*, 32 U.S.L. Week 2516 (Mass. March 6, 1964). See note 28 *supra*.

49. N.Y. Vehicle and Traffic Law § 1193 provides: "A police officer may, without a warrant, arrest a person, in case of a violation of section eleven hundred ninety-two, if such violation is coupled with an accident or collision in which such person is involved, which in fact has been committed, though not in the police officer's presence, when he has reasonable cause to believe that the violation was committed by such person." This section is derived from § 70(5)(c) of the Vehicle and Traffic Law of 1929.

50. 9 Cal. App. 13, 98 Pac. 43 (Dist. Ct. App. 1908).

officer might take whether plaintiff was under arrest or not.<sup>51</sup> Under California law the police have a right to make inquiry in a proper manner of anyone upon the public streets at a late hour if the surroundings are such as to indicate to a reasonable man that the public safety demands such identification.<sup>52</sup> In the *Gisske* case, the fact that crimes had recently been committed in that neighborhood, that plaintiff was found at a late hour in the locality, and that he refused to answer questions were circumstances which should lead a reasonable man to investigate further.

Recent California cases have more carefully delineated this right of the police to stop and question. In *People v. Simon*,<sup>53</sup> the Supreme Court of California held that it was reasonable for an officer to question persons loitering in the warehouse area at night, but found that there were no reasonable grounds on this fact alone for a search of their persons which disclosed a marijuana cigarette.<sup>54</sup> This was not a case in which the officer knew or reasonably believed that a felony had been committed in the neighborhood as in the *Gisske* case.

A search may not be justified by what it turned up. Although the court stated that there is nothing unreasonable in an officer's questioning persons out of doors late at night, the mere feeling of the officer that the person had no lawful business there would not justify the search of his person.<sup>55</sup> The opinion stated that in some circumstances an officer stopping and questioning a person at night might be justified in running his hands over the person's clothing to protect himself from an attack with a hidden weapon, but certainly a search so intensive as that made here could not be so justified.<sup>56</sup> A general search or a search based upon unfounded suspicion is not justified under the California rule. The evidence of the possession of narcotics in this case was suppressed and the charge dismissed.

*People v. Ambrose*<sup>57</sup> is a later California case which upheld the right of the police to stop and question under suspicious circumstances. In this case the police saw the defendant walking with a flashlight and gloves sticking out of his pocket in a neighborhood where there had been recent burglaries. They stopped and questioned him, and, after getting unsatisfactory answers, searched and took a screwdriver from his pocket. The court held that under the circumstances they were justified in concluding

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51. *Id.* at 16, 98 Pac. at 45.

52. Cal. Pen. Code § 833.

53. 45 Cal. 2d 645, 290 P.2d 531 (1955).

54. *Id.* at 649-50, 290 P.2d at 534-35. At the time this case was decided, California had adopted the exclusionary rule as to illegally obtained evidence. *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

55. 45 Cal. 2d at 650, 290 P.2d at 534-35.

56. *Id.* at 650, 290 P.2d at 534.

57. 155 Cal. App. 2d 513, 318 P.2d 181 (Dist. Ct. App. 1957).

that a person carrying a flashlight and a pair of gloves was a suspicious person and they were entitled to question him. These circumstances, coupled with the false answers defendant gave to the questioning officers, were held to be sufficient grounds to justify an arrest.<sup>58</sup>

*People v. Blodgett*<sup>59</sup> shows how far some states have gone without any special legislation. The California Supreme Court upheld the right of police officers, who observed a taxicab double parked outside a hotel at 3:00 A.M. and the defendant and two others getting in and out of the cab, to approach and order the occupants out of the cab for investigation. When they saw the defendant shove his hand down beside the seat cushion, they searched the cab and found marijuana cigarettes beside the seat cushion. California had previously adopted the exclusionary rule,<sup>60</sup> so the defendant moved to exclude the evidence of the narcotics as unlawfully seized. The court denied his appeal and held that in view of the late hour and the unusual conduct of the occupants of the cab, it was not unreasonable for the officers to approach and to order them out of the cab for questioning. When the officers observed the defendant's furtive action as he got out, they had reasonable grounds for believing that he was hiding contraband and the search of the cab was therefore reasonable. From the decision in this case it appears that California has been much more elastic in its interpretation of the exclusionary rule than New York has been.<sup>61</sup> It apparently was much less strict than the Supreme Court in *Henry v. United States*.<sup>62</sup>

Illinois has also held, in *People v. Henneman*<sup>63</sup> and *People v. Exum*,<sup>64</sup> that the police have the right to stop and question suspicious persons. In *Henneman* the court said:

That the officers had a right to stop and question plaintiff in error and his companion cannot be doubted, and if there were disclosed by such questioning, facts which would tend to establish suspicion that plaintiff in error was engaged in or had been guilty of a crime, his arrest, made as a result of such belief on the part of the officers, would be a legal arrest and a search following such an arrest would not be an unreasonable search.<sup>65</sup>

This ruling in *Henneman* might be considered dicta because the Illinois Supreme Court then went on to hold that the officers had not merely stopped and questioned the defendants but had approached their

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58. Id. at 516-17, 524, 318 P.2d at 184, 189.

59. 46 Cal. 2d 114, 293 P.2d 57 (1956).

60. *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955).

61. Compare *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956), with *People v. Moore*, 11 N.Y.2d 271, 183 N.E.2d 225, 228 N.Y.S.2d 822 (1962).

62. 361 U.S. 98 (1959).

63. 367 Ill. 151, 10 N.E.2d 649 (1937).

64. 382 Ill. 204, 47 N.E.2d 56 (1943).

65. 367 Ill. at 154, 10 N.E.2d at 650-51.

car, immediately ordered them out, searched the car and found two guns for the unlawful possession of which they were convicted. However, the same Supreme Court of Illinois in *Exum* reaffirmed its position in *Henne-man* and upheld the right of the police to stop and question the appellant in this later case. The court, in *Exum*, stated that all of the circumstances must be taken into consideration to determine if reasonable grounds existed.<sup>66</sup> Among these were the lateness of the hour, the fact that the police were investigating two thefts in the neighborhood, that they saw the defendant crouched down toward the right hand door of his parked car, that the car had a Missouri license plate and that the defendant was a Negro in a white neighborhood. Also, when the policeman approached and questioned defendant, they saw a camera, a key cutting machine and an automobile code book on the seat of the car. When questioned about these, the defendant said that he did not know to whom they belonged although he produced a license for the car. He was then placed under arrest and when searched, property previously reported stolen was found in his possession. The court said that in its opinion: "[I]t was [not] unreasonable for the officers to believe, nor can we say that a prudent and cautious man would not have strongly suspected, under the existing circumstances, that the defendant had been engaged in the commission of a crime."<sup>67</sup>

It is apparent that both by case law and by statute in other states,<sup>68</sup> there has been ample precedent for the amendment to New York's Code of Criminal Procedure authorizing the stopping and questioning of persons upon reasonable grounds. Similar rules of law have existed in other states for many years without a successful challenge.

#### IV. FEDERAL COURT DECISIONS

Although there are no federal cases specifically related to the Uniform Arrest Act, the question of investigation versus arrest has been considered, and there are many federal court decisions on "probable cause" and "reasonable grounds" for an arrest which will be of value in interpreting state law, particularly now that the exclusionary rule applies to all of the states. The classic statement of probable cause was made by Mr. Chief Justice Marshall in *Locke v. United States*:<sup>69</sup> "It [probable cause] imports a seizure made under circumstances which warrant suspicion."<sup>70</sup>

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66. 382 Ill. at 212, 47 N.E.2d at 60.

67. *Ibid.*

68. In addition to the states discussed in the text, Missouri in *State v. Cantrell*, 310 S.W.2d 866 (Mo. Sup. Ct. 1958); Oklahoma in *Hargus v. State*, 58 Okla. Crim. 301, 54 P.2d 211 (1935); Oregon in *City of Portland v. Goodwin*, 187 Ore. 409, 427, 210 P.2d 577, 585 (1949); and West Virginia in *State v. Hatfield*, 112 W. Va. 424, 164 S.E. 518 (1932), have upheld the right and duty of the police to stop and question under reasonable circumstances.

69. 11 U.S. (7 Cranch) 339 (1813).

70. *Id.* at 348.

Recent Supreme Court decisions have made it clear that mere suspicion is not enough for probable cause. The majority of the Supreme Court made this point abundantly clear in *Henry v. United States*.<sup>71</sup> In this case, FBI agents investigating a reported theft of liquor from an interstate shipment had information that an associate of the defendant was involved. The agents were following him when they saw him load a car with cartons from an alleyway in a residential district. The agents followed the car and waved it to a stop. When they approached the car they could see that the cartons in the seat bore labels addressed to an out-of-state company. The cartons were later identified as containing radios stolen from an interstate shipment.

The majority of the Supreme Court held that there was no probable cause for the arrest and that the evidence of the stolen property could not be admitted since it was the result of an unlawful search and seizure.<sup>72</sup> The prosecution in this case, however, had conceded that the arrest took place when the agents stopped the car in which the defendant was riding, and the majority agreed that this was their view of the facts: "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."<sup>73</sup> Mr. Justice Douglas, in discussing probable cause, stated that evidence required to establish guilt is not necessary, but good faith on the part of the officer is not enough:<sup>74</sup> "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."<sup>75</sup>

Further explanations offered by the Court in this case are valuable as a guide to the interpretation of probable cause in arrests under state law and the new question in New York of reasonable grounds for stopping and questioning. Mr. Justice Douglas explained that the mere fact that packages have been stolen does not make every man who carries a package subject to arrest or the package subject to seizure.<sup>76</sup> However, the shape and design of the package may be sufficient to provide probable cause, as may also the weight of it or the manner in which it is being carried, or flight or furtive actions on the part of the person carrying it.

Mr. Justice Clark, in his dissenting opinion, believed that the mere stopping of the car did not amount to an arrest.<sup>77</sup> In his opinion, the earlier events disclosed ample grounds to justify the stopping of the car and the questioning of the occupants. The sight of the cartons during this

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71. 361 U.S. 98 (1959).

72. *Id.* at 102-04.

73. *Id.* at 103.

74. *Id.* at 102.

75. *Ibid*; see *Giordenello v. United States*, 357 U.S. 480, 486 (1958); *United States v. Di Re*, 332 U.S. 581, 592 (1948).

76. 361 U.S. at 104.

77. *Id.* at 106 (dissenting opinion).

questioning, plus the obviously false answers of the defendant, gave the agents probable cause for arrest.<sup>78</sup>

The majority opinion left no room for consideration of the possibility of a period of investigation rather than an arrest. However, since the case was decided on the agreed statement of facts that the arrest took place the instant that the car was stopped, there was no real issue of investigation or arrest to be determined.

However, in *Rios v. United States*,<sup>79</sup> this question was considered in a case involving the arrest of a person for possession of narcotics. The defendant was apprehended while alighting from a taxicab which had stopped at a red light. The Court held that there was a question of fact as to whether the officers were still in the process of investigating when they approached the taxicab and saw the defendant drop a recognizable package of narcotics on the floor of the cab; or whether there was an immediate arrest as soon as they reached the cab and before they saw the narcotics.<sup>80</sup> If they were still in the process of investigation when they saw the narcotics, a subsequent arrest would be valid and the evidence of possession would be admissible. If the arrest had taken place before the narcotics were seen, then they had no probable cause at the instant of arrest and the evidence must be suppressed. The case was remanded for a new trial, which apparently was never held.

In *United States v. Vita*,<sup>81</sup> the United States Court of Appeals for the Second Circuit held that a period of detention for investigation for over eight hours did not constitute an arrest. Since the defendant had been stopped by FBI agents on the sidewalk outside of his hotel at about 10:00 A.M. and was requested to come to FBI headquarters where he was not formally placed under arrest until 6:52 P.M., he sought the suppression of a confession obtained during the period of detention under the rule of *Mallory v. United States*.<sup>82</sup> The trial court found that he went voluntarily with the agents upon their request, so that there was no illegal detention so as to bar the confession.<sup>83</sup> However, because of the length of time involved in the period of detention, the Second Circuit considered the question of his status during the day and held that he was being detained for investigation and not under arrest. The court stated:

Moreover, even if Vita had been involuntarily detained for questioning or had believed that he had no choice but to accompany the F.B.I. agents to headquarters, we would not necessarily hold such detention to be an "arrest" within the meaning of Federal Rule of Criminal Procedure 5(a). The rule does not apply to a case in which

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78. *Ibid.*

79. 364 U.S. 253 (1960).

80. *Id.* at 262.

81. 294 F.2d 524 (2d Cir. 1961), cert. denied, 369 U.S. 823 (1962).

82. 354 U.S. 449 (1957).

83. *United States v. Vita*, 294 F. Supp. 172 (E.D.N.Y. 1962).



federal officers detain a suspect for a short and reasonable period in order to question him. The right to question has its roots in early English practice and was approved by the common law commentators and the courts. . . . This prerogative of police officers to detain persons for questioning is not only necessary in order to enable the authorities to apprehend, arrest, and charge those who are implicated; it also protects those who are readily able to exculpate themselves from being arrested and having formal charges made against them before their explanations are considered.<sup>84</sup>

A complete discussion of New York law on detention for investigation, rather than arrest, may be found in *United States v. Bonanno*.<sup>85</sup> This was a ruling by Judge Irving R. Kaufman on a motion by the defendant, one of those attending the so-called Apalachin conference, for the suppression of evidence gathered by the police during an investigation. Fifty-eight persons, allegedly belonging to that organization which has been variously described before Senate committees as the Mafia, the Syndicate and Cosa Nostra, gathered on the estate of Joseph Barbara, Sr., in Apalachin, New York for reasons officially unknown. The state police with some federal agents waited outside of the estate on the public road and stopped all of the cars coming out. They not only asked the drivers for identification but also all of the passengers. After identification they allowed them to drive on, until it began raining, at which time they stopped the cars and told them to go to the police station, where they were asked to produce identification and questioned as to what they were doing at Barbara's estate. After this they were allowed to leave. Anyone who refused to answer was not questioned further or detained but was recognized by the officers. They were later indicted on federal charges of conspiracy to obstruct justice by giving false testimony. They moved to suppress the information as to identity and the conflicting statements given to the police during the time they were stopped and questioned, claiming it was unlawfully obtained during an illegal arrest.

The court held that there had been no arrest in the technical sense since the New York Code of Criminal Procedure defines arrest as taking a person into custody that he may be held to answer for a crime.<sup>86</sup> There was no intent upon the part of the police to hold anyone on a charge of crime, but only to stop and identify those present at a gathering of known criminals. The court did not base its decision solely upon the fact that there was no technical arrest, or upon the intent of the police, but examined the whole question of investigation and temporary detention in

84. 294 F.2d at 529-30. The Supreme Court's recent holding in *Escobedo v. Illinois*, 357 U.S. 902 (1964), would not affect the ruling in *Vita*. There was no failure to warn defendant of his right to counsel. *Escobedo* recognized the power of the police to investigate, but held that when the investigation was no longer a general inquiry but began to focus on the person, the accused was entitled to counsel.

85. 180 F. Supp. 71 (S.D.N.Y.), rev'd on other grounds sub nom. *United States v. Bufalino*, 285 F.2d 403 (2d Cir. 1960).

86. N.Y. Code Crim. Proc. § 167.

the light of the fourth amendment to the Constitution.<sup>87</sup> The conclusion reached was that not every temporary restriction of absolute freedom of movement is an illegal police action demanding suppression of the resultant evidence.<sup>88</sup>

### V. NEW YORK DECISIONS

Persons who have been shocked by the use of the word "suspects" in the new statute will be even more surprised at its use in New York cases both old and new.<sup>89</sup>

*Limbeck v. Gerry*<sup>90</sup> is the leading case in New York involving civil suits for damages for false arrest. The issue in the case was whether there had been an arrest or whether there had been a voluntary submission to investigation. Some jewelry had been taken from Gerry's house, and the police took a maid servant to the police station where she was questioned, made a statement and was released without charges. The court held that it was a question of fact for the jury to decide if there had been an arrest or if the maid had voluntarily gone to the stationhouse with the detectives. The court, in this 1896 case, stated the general rule which has prevailed in civil suits for false arrests ever since.

Any deprivation of the liberty of another, without his consent, whether it be by actual violence, threats or otherwise, constitutes an imprisonment within the meaning of the law.<sup>91</sup>

However the court also stated:

When a felony has been committed the police are charged with the duty of investigating it, in order to ascertain who has committed it; and for that purpose may request the attendance at the police station for the purpose of examination of all persons whom they have reason to believe have any knowledge of the offense or the means whereby it was committed.<sup>92</sup>

The jury found for the defendant in this case holding that there was no arrest but that the plaintiff had voluntarily submitted to investigation.

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87. 180 F. Supp. at 77-86.

88. *Id.* at 78.

89. See generally *People v. Morgan*, 13 N.Y. Supp. 448 (Sup. Ct. 1891), a "stop and frisk" case without the authorization of any applicable statute. The court held that the demeanor and answers of the accused, the time of night and the fact that he was loitering on a street justified a conviction based upon a frisk and finding of burglar's tools. *People v. Esposito*, 118 Misc. 867, 194 N.Y. Supp. 326 (Ct. Spec. Sess. 1922), approved the stopping and frisking of the defendant as being incident to a lawful arrest. The court held that the circumstances including the defendant loitering on the street late at night, glancing at the officer repeatedly, and retreating rapidly at the officer's approach could reasonably be taken as flight. The fact that Esposito held both hands in his coat pocket when the officer stopped him justified a frisk and the finding of the unlawfully possessed gun.

90. 15 Misc. 663, 39 N.Y. Supp. 95 (Sup. Ct. 1896).

91. *Id.* at 668, 39 N.Y. Supp. at 97.

92. *Id.* at 669, 39 N.Y. Supp. at 98.

The court's definition of probable cause in this early case is also interesting in its use of the word "suspicion."

Probably cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in his belief that the person accused is guilty of the offense with which he is charged.<sup>93</sup>

The rule in this case, which has been followed in many other cases, that any restraint upon the liberty of movement of another constitutes an arrest or imprisonment,<sup>94</sup> ignores the statutory definition of an arrest.<sup>95</sup> In a civil suit for damages for false arrest this rule does not do any substantial harm since a jury will usually give just compensation for the arrest of an innocent person whether there was probable cause for the arrest or not. However, as a rule to be followed by a criminal court judge in ruling on the admissibility of evidence, it will not suffice.

*People v. Coffey*,<sup>96</sup> is a recent case which is particularly interesting because of the court's use of the word "suspicion" in finding probable cause for an arrest. If the court of appeals quotes with approval the use of the word "suspicion" to indicate what it means by reasonable grounds for a lawful arrest without a warrant,<sup>97</sup> it seems that it should be permissible for the state legislature to use the word "suspects" to indicate what it means by reasonable grounds for stopping and questioning a person.

Since *Mapp v. Ohio*<sup>98</sup> imposed the exclusionary rule upon all of the states, New York courts have granted motions to suppress evidence as illegally seized in many cases. Most of these cases were based upon a finding that a search and seizure took place after an arrest which was declared invalid because it was not based upon probable cause. Usually there was no question of an investigation, but rather an immediate or summary arrest was involved, as in *People v. Moore*<sup>99</sup> and *People v. Loria*.<sup>100</sup> Until very recently the New York courts made no mention of, or gave any consideration to, the question of investigation as differentiated from arrest.

The supreme court in *People v. Salerno*<sup>101</sup> specifically upheld the right of the police to stop and question the defendant under suspicious circumstances and ultimately to "frisk" and discover an unlicensed pistol. A motion to suppress was denied a year and a half before the effective date of the amendment to section 180-a of the Code of Criminal

93. Id. at 674, 39 N.Y. Supp. at 101.

94. Id. at 668-75, 39 N.Y. Supp. at 97-101.

95. N.Y. Code Crim. Proc. § 167.

96. 12 N.Y.2d 443, 191 N.E.2d 263, 240 N.Y.S.2d 721 (1963).

97. Id. at 451, 191 N.E.2d at 266, 240 N.Y.S.2d at 725.

98. 367 U.S. 643 (1961).

99. 11 N.Y.2d 271, 183 N.E.2d 225, 228 N.Y.S.2d 822 (1962).

100. 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).

101. 38 Misc. 2d 467, 235 N.Y.S.2d 879 (Sup. Ct. 1962).

Procedure, but the court referred to the Uniform Arrest Act in other states with approval. The court stated that there was "substantial authority for the right of the police under certain circumstances to take investigatory action not amounting to either a search or an arrest."<sup>102</sup> The court found that at the time of the search in *Salerno*, the officers had sufficient facts to have probable cause for a search. They were the time of night, the way the defendant was dressed, the fact that he was carrying a loaded shotgun, had given false answers to their questions, and had stated that he was going hunting, which would constitute a misdemeanor within the city limits.<sup>103</sup> The court also stated that having decided reasonably to investigate further, the officers were entitled to "frisk" for hidden weapons which might endanger their lives: "Under the circumstances, the 'frisking' . . . represented no more than a proper balance between the constitutional rights of the officers and the public to their lives and the constitutional right of the defendant to his privacy."<sup>104</sup>

New York appellate courts are now overruling lower court decisions on the suppression of evidence which either ignored the question of investigation as distinguished from arrest, or adverted to it briefly only to reject it summarily. Justice Nathan R. Sobel, who has written extensively on the constitutional issues in searches and arrests,<sup>105</sup> in his ruling to suppress the evidence in *People v. Estrialgo*,<sup>106</sup> conceded that the police have the right to detain during an investigation but held that this right is severely restricted.<sup>107</sup> The lower court held that an arrest took place when the police, in order to verify defendant's alleged destination, placed him in a car to drive him to the address given.<sup>108</sup> The appellate division sharply rejected this view of the limitations placed upon the police investigation, and, in reversing, stated:

The precise time at which an "arrest" occurred . . . should be determined as a question of fact whenever such time becomes a relevant [sic] factor . . . . In the present case, it should be borne in mind that police have the right to approach persons for the purpose of routine investigation; and that such investigation does not constitute arrest . . . . Whether the detention of this defendant for questioning was for more than a reasonable period of time should be determined as a question of fact within the rules stated in *United States v. Vita* . . . .<sup>109</sup>

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102. *Id.* at 472, 235 N.Y.S.2d at 886.

103. *Id.* at 471-72, 235 N.Y.S.2d at 885.

104. *Id.* at 474, 235 N.Y.S.2d at 887.

105. Sobel, *Current Problems in the Law of Search and Seizure* (1964); Sobel, *The Pleader: A Comment on the Law of Search and Seizure* (1961).

106. 37 Misc. 2d 264, 233 N.Y.S.2d 558 (Sup. Ct. 1962), *rev'd sub nom. People v. Entrialgo*, 19 App. Div. 2d 509, 245 N.Y.S.2d 850 (2d Dep't 1963) (*per curiam*), *aff'd mem.*, 14 N.Y.2d 733, 199 N.E.2d 384, 250 N.Y.S.2d 293 (1964).

107. 37 Misc. 2d at 282, 233 N.Y.S.2d at 576-77.

108. *Id.* at 284, 233 N.Y.S.2d at 589.

109. 19 App. Div. 2d at 511, 245 N.Y.S.2d at 853.

In *People v. Garcia*,<sup>110</sup> a case involving a search before an arrest, the appellate division reversed a lower court ruling on a motion for the suppression of evidence and held that the police were entitled to use their reasoning faculties upon all of the facts of which they had special knowledge. This case is unique in New York in that it permitted a search before the arrest and authorized the finding of probable cause based upon facts and circumstances which would appear innocuous to the average reasonable man but would be recognizable to an expert in burglary investigation as the *modus operandi* of an apartment house burglar. This decision is consistent with United States Supreme Court decisions which have approved searches which took place before, but were incident to, the arrest—provided there was probable cause for the arrest at the time of the search.<sup>111</sup> The New York courts apparently are now willing to follow this rule.

At about the same time that the Supreme Court, Bronx County, was authorizing stopping and frisking in *Salerno*, the Supreme Court, New York County, reached an exactly opposite conclusion as to the suppression of evidence in *People v. Rivera*.<sup>112</sup> The New York Court of Appeals, in a landmark decision reversing the ruling of the lower court suppressing the evidence, held that under New York law the police have a right to stop and question a person under circumstances which would reasonably require investigation<sup>113</sup> and also to frisk the person being questioned as an incident to the inquiry.<sup>114</sup> The "stop and frisk" amendment<sup>115</sup> did not apply to this case, although the same principles underlie both the new statute and the validity of the police action in *Riviera*. Of course, if the highest court in the state upholds the right of the police to stop, question and frisk without the authorization of a special statute, it is reasonable to expect that they will uphold the right to stop and frisk under the new statute.

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110. 20 App. Div. 2d 855, 248 N.Y.S.2d 154 (1st Dep't 1964) (per curiam). Detectives assigned to a special burglary squad knew that the defendants had been arrested and charged with burglary in another county and were keeping them under surveillance. They followed them on three different days to the Park Avenue residential area in Manhattan and watched them going into one apartment house after another. On the third day, when they came out of an apartment house, one was carrying a woman's make up kit. The detectives stopped them, opened the bag and discovered a mink coat. They then placed the defendants under arrest and after checking the apartment house, found the apartment from which the mink coat had been taken.

111. *Ker v. California*, 374 U.S. 23 (1963); *Husty v. United States*, 282 U.S. 694 (1931).

112. 38 Misc. 2d 586, 238 N.Y.S.2d 620 (Sup. Ct.), aff'd mem. 19 App. Div. 2d 863, 245 N.Y.S.2d 1039 (1st Dep't 1963), rev'd, 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 458 (1964).

113. 14 N.Y.2d at 445, 201 N.E.2d at 34, 252 N.Y.S.2d at 461-62.

114. *Id.* at 447, 201 N.E.2d at 35, 252 N.Y.S.2d at 463.

115. N.Y. Code Crim. Proc. § 180-a.

In *Rivera*, three detectives in plain clothes were on patrol in an unmarked car at 1:30 A.M. in a neighborhood on the lower east side of Manhattan where there had been quite a bit of crime, including robberies and assaults. They were parked in the vicinity of a bar and grill and observed the defendant and another man walking back and forth along the sidewalk looking into the window of the bar and grill for about five minutes. The defendant looked in the direction of the car, said something to his companion and started walking rapidly in the opposite direction. The police jumped out of the car and shouted for them to stop. When they did, one detective, without further conversation, patted the outside of their clothing, as he said: "for my own protection." He felt what seemed to be a gun in defendant's pocket, reached in and removed a loaded pistol. Defendant was charged with possession of a concealed weapon without a license. He moved to suppress the evidence as inadmissible, contending it was the result of an unlawful search made after an arrest which was made without probable cause.<sup>116</sup>

The court of appeals, in reversing, stated that the first problem is the authority of the police in the circumstances here to stop and question the defendant. The validity of the subsequent police action would necessarily rest upon the initial right to stop the defendant and make the immediate inquiry on the street.<sup>117</sup> The court ruled that the authority of the police to stop the defendant and question the defendant in the circumstances shown here, is perfectly clear: "The business of the police is to prevent crime . . . Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities."<sup>118</sup> The court held that the reasons for stopping to question need not be of the same degree or measure of conclusiveness as that required for an arrest. The detention on the street to make an inquiry is not an arrest, and the ground upon which the police may stop and question may be less than the grounds necessary for an arrest.<sup>119</sup>

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116. 38 Misc. 2d at 587, 238 N.Y.S.2d at 621. On the motion to suppress in the trial court, the People conceded, and the court found, that at the time the detective made the frisk he had no probable cause to arrest the defendant. The defense counsel conceded that under the circumstances, the detectives had the right to detain defendant for questioning but denied that they had the right to search him for dangerous weapons. Id. at 587, 238 N.Y.S.2d at 621-22. The People contended that a frisk is not a search for evidence, but a protective measure necessary for the performance of police duty. Id. at 588-89, 238 N.Y.S.2d at 622. The lower court, holding that a frisk was a search and was illegal on the facts of this case, required the suppression of the evidence—the gun. Id. at 589, 238 N.Y.S.2d at 642. The fact that the prosecutor, unnecessarily it seems, conceded that the officer had no probable cause for an arrest, makes this case, of necessity, a ruling strictly on the right to stop and frisk without probable cause for an arrest.

117. 14 N.Y.2d at 444, 201 N.E.2d at 34, 252 N.Y.S.2d at 461.

118. Ibid.

119. Id. at 445, 201 N.E.2d at 34, 252 N.Y.S.2d at 461.

After accepting the right of the police to stop and question under proper circumstances, the court then recognized the fact that the answer to the question propounded by the police under such circumstances might be a bullet. The court held that a "frisk is a reasonable and constitutionally permissible precaution to minimize that danger."<sup>120</sup> The frisk in this case was the contact or patting of the outer clothing of a person to detect if a concealed weapon was being carried. A frisk is an invasion of an individual's right of privacy, but so is the stopping and questioning in the first instance, which was justified under the circumstances here. A frisk is less of an invasion of privacy than a full search of the person. It is justified on less conclusive grounds than a full search, just as stopping and questioning may be justified on less than the grounds necessary for an arrest.<sup>121</sup> From the time the detective, in the process of frisking the defendant, touched the object which he inferred correctly to be a gun, there was probable cause to arrest the defendant and to proceed further to make a full search and take the gun.

Judge Fuld, the sole dissenter in *Rivera*, objected that the issue is not the right of the police to stop and question, but rather the search of the person of an individual without probable cause for an arrest.<sup>122</sup> He felt it was an unconstitutional police tactic which removed the gun from Rivera's pocket and was an invasion of his privacy condemned by the fourth amendment. In his opinion, the power to conduct a search was being given to the police based upon their subjective feeling that they were in danger.<sup>123</sup>

Judge Fuld stated that both court decisions and dictionaries define a "frisk" as a search. Neither the fourth amendment nor the common law of torts, according to his opinion, distinguishes between the slightest touching and a more elaborate search. He cited *Henry v. United States*,<sup>124</sup> to show that police conduct is not justified by what a subsequent search discloses and that suspicion is not enough for an officer to lay hands on a citizen. He held that if the police officer had no probable cause to believe that a crime had been or was being committed at the time he approached, his act of running his hands over the defendant's clothing cannot be considered reasonable by constitutional standards. He stated that if the gun discovered by this search is admitted into evidence, the exclusionary rule of the *Mapp* case is being circumvented. Judge Fuld did recognize that the police in the proper performance of their duties had a responsibility to investigate suspicious activity and that

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120. Id. at 446, 201 N.E.2d at 35, 252 N.Y.S.2d at 463

121. Id. at 447, 201 N.E.2d at 35, 252 N.Y.S.2d at 463.

122. Id. at 448, 201 N.E.2d at 36, 252 N.Y.S.2d at 465 (dissenting opinion).

123. Id. at 451, 201 N.E.2d at 38, 252 N.Y.S.2d at 467 (dissenting opinion).

124. 361 U.S. 98 (1959).

stopping and questioning individuals was permissible; but, the power to investigate does not give the police the right to search except incident to an arrest,<sup>125</sup> and that the solution lies in the police adopting other means to safeguard themselves while questioning.<sup>126</sup>

## VI. CONSTITUTIONALITY

The issue of the constitutionality of the stop and frisk statutes or the right to stop and frisk under common law has never been decided by the Supreme Court of the United States. Judge Fuld, in his dissenting opinion in *Rivera*, discussed the issue at some length and the majority opinion by Judge Bergen specifically upheld the constitutionality of the action by the police in stopping, questioning and frisking under the facts of the case. The decision declared: "A State is not precluded from 'developing workable rules' governing searches to meet 'the practical demands of effective criminal investigation and law enforcement' if the State does not violate the constitutional standard of what is reasonable . . . ."<sup>127</sup> *Ker v. California*<sup>128</sup> held that *Mapp v. Ohio* did not establish supervisory authority over the state courts and implied no obliteration of the state laws relating to arrests and searches.<sup>129</sup> The reasonableness of the search is for the trial court to determine in the first instance from the facts and circumstances of the case, in the light of the "fundamental criteria" laid down by the fourth amendment and the opinions of the Supreme Court applying that amendment.<sup>130</sup> On appeal the findings of the state courts will be examined by the Supreme Court, which will, where necessary to the determination of constitutional rights of the individual, make "an independent examination of the facts, the findings, and the record . . . ."<sup>131</sup>

The *Ker* case also held that the lawfulness of an arrest without a warrant is to be determined by reference to state law.<sup>132</sup> The Court in *Ker* recognized the judicial exception made to the California law of arrest, which permitted officers to break and enter in making an arrest without first knocking and announcing their authority.<sup>133</sup> It seems just as valid for the Court to hold that the stopping, questioning, and frisking of persons, upon reasonable grounds, sanctioned by the law of New York is not unreasonable under the standards of the fourth amendment as applied to the states through the fourteenth amendment.

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125. 14 N.Y.2d at 451, 201 N.E.2d at 38, 252 N.Y.S.2d at 467 (dissenting opinion).

126. Id. at 452, 201 N.E.2d at 39, 252 N.Y.S.2d at 468 (dissenting opinion).

127. Id. at 448, 201 N.E.2d at 36, 252 N.Y.S.2d at 464.

128. 374 U.S. 23 (1963).

129. Id. at 31.

130. Id. at 33.

131. Id. at 34.

132. Id. at 37.

133. Ibid.



Judge Nathan R. Sobel of the Kings County Supreme Court believes that *Ker* commands federal standards upon state courts even to mandating fact-finding according to federal standards.<sup>134</sup> However Associate Justice Traynor of the California Supreme Court has emphasized in his writings<sup>135</sup> that there is no mandate to the states that they must abide by the various interpretations of the exclusionary rule in the federal courts—"interpretations freighted with orthodox property and tort concepts."<sup>136</sup> Judge Traynor, who wrote the opinion in *People v. Cahan*,<sup>137</sup> which was mentioned with approval by the United States Supreme Court in several cases,<sup>138</sup> specifically stated that the state courts need not follow the needless refinements of federal law and that the adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure.<sup>139</sup> He has stated further that there is nothing in *Mapp* which specifies what constitutes lawful arrest in the states, and nothing regarding the large question of permissible investigation before arrest.<sup>140</sup> In the determination of cases involving arrests which developed after the police stopped and questioned persons on the street, the question of whether the police had the right to stop and question under the circumstances of the case must be determined, as well as whether there was probable cause for arrest at the instant of the arrest.

The lawfulness of an arrest cannot be determined by whether or not a jury ultimately convicts the defendant. The test of the legality of an arrest is whether there was probable cause for the arrest at the instant of the arrest.<sup>141</sup> Whether or not a person is convicted is affected by many things which can happen after the arrest, such as the loss of evidence, a break in the chain of handling evidence, the death of witnesses, the skill of a defense attorney or lack of preparation on the part of the prosecutor, and many other things which may result in a failure to find the defendant guilty beyond a reasonable doubt. On a motion to suppress before trial, obviously there is no jury and the judge must be the finder of the facts. If he finds that the officer had reasonable grounds to believe that the person had committed a crime at the instant of arrest and the other requirements of the law of arrest have been met, the arrest was lawful, no matter how the ultimate prosecution turns out.

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134. Sobel, *op. cit.* supra note 105, at 10.

135. See Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L.J. 319.

136. *Id.* at 320.

137. 44 Cal. 2d 434, 282 P.2d 905 (1955).

138. E.g., *Ker v. California*, 374 U.S. 23, 29-30 (1963); *Mapp v. Ohio*, 367 U.S. 643, 651-52 (1961); *Elkins v. United States*, 364 U.S. 206, 220-21 (1960).

139. 44 Cal. 2d at 451, 282 P.2d at 914-15.

140. Traynor, *supra* note 135, at 342.

141. E.g., *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959).

The Supreme Court has stated that the Constitution does not forbid all searches but only unreasonable searches and seizures.<sup>142</sup> However, what is an unreasonable search within the fourth amendment depends upon the shifting views of the members of the Court and has never been clearly resolved for the benefit of lower courts or law enforcement agencies. Most of the cases of searches incident to an arrest have been concerned with searches of homes or other buildings. Next in number the Court has considered a line of cases dealing with vehicles.<sup>143</sup> The number of cases involving arrests and searches of a pedestrian have been few. *Draper v. United States*<sup>144</sup> is the leading case involving a person on foot, where defendant apparently was arrested while leaving a train. Therefore most of the discussions of probable cause and the validity of searches and seizures have related to searches of the home with the added factor of the invasion of the privacy of the home. The inviolability of a man's castle and the fear of the midnight knock on the door is not an element of the normal summary arrest on the street. The necessity to stop and identify or allow the possible criminal to escape adds another factor to the consideration of what is reasonable or unreasonable.

The decisions of the Supreme Court make it clear that an arrest without a warrant must be based upon probable cause. In *Draper*, probable cause was found by the Court to exist upon mere hearsay information from a previously reliable informer plus observation by the officers that the suspect matched the description given by the informer. In *Irby v. United States*,<sup>145</sup> probable cause for the issuance of a search warrant was held to exist where the federal narcotics agents only had hearsay information from an informer of no previous reliability, plus their observation of the activity of narcotics addicts,<sup>146</sup> which would appear innocuous to the average person. If probable cause may be made out for an arrest with or without a warrant on circumstances such as these, it should be no more difficult to make out reasonable grounds for stopping and frisking.

## VII. CONCLUSION

There is a valid distinction between an arrest and the temporary detention in the stop and frisk law. Every temporary restraint on liberty of movement is not an arrest. However, the conclusion based upon these

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142. *Elkins v. United States*, 364 U.S. 206, 222 (1960).

143. *Henry v. United States*, 361 U.S. 98 (1959); *Brinegar v. United States*, 338 U.S. 160 (1949); *Carroll v. United States*, 267 U.S. 132 (1925).

144. 358 U.S. 307 (1959). See also *Ellis v. United States*, 264 F.2d 372 (D.C. Cir.), cert. denied, 359 U.S. 998 (1959); *Green v. United States*, 259 F.2d 180 (D.C. Cir.), cert. denied, 359 U.S. 917 (1959).

145. 314 F.2d 251 (D.C. Cir. 1963).

146. *Id.* at 253.

distinctions that the fourth amendment should not apply to the temporary detention necessary for stopping and frisking is not sound logic. The fourth amendment requirement of reasonableness should apply to stopping and frisking. There must be some reasonable cause for the detention, or the constitutional prohibition against general searches has been evaded and rendered ineffective. Determination of the exact amount of facts, hearsay or circumstances necessary to constitute probable cause for an arrest is almost impossible to predict. It seems, however, that similar but lesser combinations of hearsay, facts and circumstances should be sufficient to make out reasonable grounds for temporary detention for investigation. Mere suspicion is not enough, but the knowledge and experience gained by trained officers should be considered by the court in determining if there was reasonable cause. The test should be what was known to the particular specially trained police officer who made the arrest, rather than what would appear to the average reasonable man.

It is impossible for appellate courts to find reasonable grounds for an arrest if it does not appear in the record. One of the sources of the difficulty is the inarticulateness of the police, particularly when trying to comply with the rules of evidence in a trial. The hearing on the motion to suppress evidence, prior to trial, where hearsay and background information are acceptable gives greater opportunity for the determination of probable cause. The glib statement that, "the 'trained nose' of a gendarme is not an adequate substitute for the United States Constitution,"<sup>147</sup> sounds like a telling thrust, but obviously no amount of training or experience will make an officer's nose any better than any other person's. His experience with past crimes, his observation of the actions of criminals, and his training in the *modus operandi* of criminals gives him a specialized type of knowledge. This coupled with observation of certain actions requires only the mental process known as simple apprehension for him to have reasonable grounds to believe that a crime is being committed.

To illustrate, a New York newspaper printed a story about a lieutenant in a police stationhouse who glanced out a window, saw one man walk past another man on the street, stop, turn back and start to wipe off the front of the other's suit with his handkerchief. The officer ran out and stopped both men. He asked the man whose coat had been brushed off if he had a wallet. The man put his hand in his pocket and found that his wallet was gone. The wallet was produced by the solicitous one when he was ordered to hand it over. The officer knew from his past experience that he was watching a favorite trick of pickpockets, who walk past their victim, then turn back with profuse apologies for accidentally spitting on him and vigorously wipe off the victim's coat with a handkerchief, while

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147. *People v. Brown*, 32 Misc. 2d 846, 849, 225 N.Y.S.2d 157, 161 (Queens County Ct. 1962).

he lifts his wallet.<sup>148</sup> To the average person the activity would have been meaningless. To the trained officer it was reasonable grounds for suspecting that a crime was being committed in his presence, even though he could not see all of the elements necessary to prove the commission of the crime in court. He investigated in the usual manner by stopping and questioning and developed the evidence necessary for the proof of the crime, and probable cause for an arrest.

According to Mr. Justice Douglas in *Henry v. United States*,<sup>149</sup> the fact that a package has been stolen does not authorize the police to stop and question everyone carrying a package. However, if the size and shape of the package match the stolen one, or if the furtive manner or flight of a person carrying the package is added to the other circumstances, probable cause for arrest may be made out. In such circumstances the police would at least have reasonable grounds for stopping and questioning.

Mr. Justice Jackson in *Brinegar v. United States*,<sup>150</sup> indicated that it would seem reasonable for the police to stop and search every car leaving the neighborhood of a kidnapping. *United States v. Bonanno*,<sup>151</sup> held that the police may temporarily detain and question all persons in a car, when there are additional circumstances such as a meeting of known criminals with other unknown persons. The New York State Vehicle and Traffic Law grants the police the right to demand the presentation of a driver's license and registration for the vehicle from the operator of any motor vehicle.<sup>152</sup> The opinion in *Bonanno* declared that it was obvious that the police had the right to detain and question everyone found standing around the body of a murder victim, and indicated that the same right should apply to persons leaving the location of any serious crime. The *Gisske*<sup>153</sup> case in California and the *Exum*<sup>154</sup> case in Illinois reached the same conclusion.

*People v. Salerno*<sup>155</sup> held that the official crime statistics published by the FBI for the city of occurrence should be taken into consideration in determining the reasonableness of police action in stopping and questioning.

It seems even more appropriate to consider the Uniform Crime Reports<sup>156</sup> on the number of police officers killed in the performance of

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148. N.Y. Daily News, July 15, 1964, p. 38, col. 1.

149. 361 U.S. 98 (1959).

150. 338 U.S. 160 (1949).

151. 180 F. Supp. 71 (S.D.N.Y.), rev'd on other grounds sub nom. *United States v. Bufalino*, 285 F.2d 408 (2d Cir. 1960).

152. N.Y. Vehicle and Traffic Law § 401(4).

153. *Gisske v. Sanders*, 9 Cal. App. 13, 98 Pac. 43 (Dist. Ct. App. 1908).

154. *People v. Exum*, 382 Ill. 204, 47 N.E.2d 56 (1943).

155. 38 Misc. 2d 467, 234 N.Y.S.2d 879 (Sup. Ct. 1962).

156. 1963 FBI Uniform Crime Reports.

duty in connection with the reasonableness of the right to frisk, when the officer believes he is in danger. According to the latest report, fifty-five police officers were murdered in the performance of duty in the year 1963.<sup>157</sup> A detailed study of 168 police killed by criminals during the last four years shows that twenty-six per cent of the officers were killed making arrests or transporting prisoners.<sup>158</sup> It is reasonable to assume that failure to frisk, or an ineffective frisk accounted for a large percentage of the killings while transporting prisoners and possibly also in the cases of arrests.<sup>159</sup> Forty-two officers were killed when they interrupted robberies and twenty-one were killed by burglars.<sup>160</sup> These two classifications include a number of incidents where police were making what appeared to be routine stops for traffic violations, but, unknown to the officers, the occupants of the automobiles were fleeing the scene of robberies or burglaries.<sup>161</sup> Eighteen were killed investigating reports of suspicious persons.<sup>162</sup>

According to the report, the rate of assaults upon police continues to climb yearly, with higher rates than the average in the larger cities.<sup>163</sup> Revolvers and automatic pistols were used in 131 of the killings of police officers and knives in two of the cases.<sup>164</sup> These statistics indicate that there is a real problem of safety for a police officer in stopping and questioning persons under suspicious circumstances. Frisking for dangerous weapons under appropriate circumstances is one way for the police to safeguard themselves. Judge Fuld, in his dissenting opinion in *People v. Rivera*,<sup>165</sup> stated that the police should adopt other means to safeguard themselves while questioning.<sup>166</sup> In the absence of bulletproof vests and electronic metal detectors, the next most common method used by the police to safeguard themselves, when they believe it is dangerous to approach someone, is to advance with guns drawn and pointed at the suspect. This is obviously a much more drastic invasion of the individual's right of privacy and also much more dangerous to his personal safety than a frisk. However, since a police officer questioning a driver of a car is necessarily exposed to fire from a weapon held by anyone in the back seat, police training courses, for cases such as armed robberies, recommend that police approach suspected cars from the rear with guns drawn and order the persons in the car to get out with their hands up. Most

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157. Id. at 33.

158. Id. at 32-35.

159. See id. at 35.

160. Ibid.

161. Id. at 34.

162. Id. at 35.

163. Ibid.

164. Id. at 34.

165. 14 N.Y.2d 441, 201 N.E.2d 32, 252 N.Y.S.2d 453 (1964).

166. Id. at 452, 201 N.E.2d at 39, 252 N.Y.S.2d at 468 (dissenting opinion).

courts would hold this to be an immediate arrest and would require probable cause for an arrest at the instant of approach.

What would happen on a motion to suppress evidence in this type of a case was indicated in a case reported in a New York newspaper. Two New York City detectives riding past the Waldorf-Astoria Hotel at night noticed an old car parked near an entrance of the hotel. As they passed they saw that the windows of the car were misty as though someone had been sitting in it for a long time. They also observed four men in the car who slumped down in their seats as if to hide when the detectives passed. The detectives approached the car from the rear with guns drawn and ordered the men out. As they got out a revolver dropped to the street. The detectives also found a loaded sawed-off shotgun in the car and a can of ether. Three of the men had criminal records, including one with fifteen previous arrests for crimes including armed robbery.<sup>167</sup> The police reported that they admitted that they were waiting for a wealthy-appearing victim to come out of the hotel so that they could rob him. The evidence was suppressed upon motion of the defense attorney and the defendants released, since there was no probable cause for an arrest at the instant of their apprehension.<sup>168</sup>

The New York State Court of Appeals, in *Rivera*, has upheld the power of the police to "stop and frisk" under proper circumstances and has ruled that every restriction on the liberty of movement of an individual is not necessarily an arrest. The right of investigation under appropriate circumstances has been established under New York law. The major question still to be resolved is how the Supreme Court of the United States will rule upon this problem. If the *Rivera* case or another goes up on appeal, they may deny certiorari, as they did in *Kavanagh v. Stenhouse*.<sup>169</sup> If they decide to hear the case the Court will "make an independent examination of the facts, the findings, and the record . . ." <sup>170</sup> The State of New York must present sufficient facts to the Court to show that stopping and frisking under proper circumstances is a reasonable exercise of the police power of the state. In order to show reasonable grounds for such detention for investigation, the state must present the true picture of the conditions that exist in areas of a big city where crimes of violence are frequent and assaults upon the police are increasing. All of the facts and circumstances known to the officer upon which he based his actions must be put in the record so that they may be made known to the Court. Only thus may the constitutional requirement of probable cause be established.

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167. N.Y. Daily News, Jan. 21, 1964, p. 5, col. 3.

168. *People v. Bacolod*, Crim. No. A1271, N.Y. City Crim. Ct., Jan. 20, 1964.

169. 174 A.2d 560 (R.I. 1961)

170. *Ker v. California*, 374 U.S. 23, 34 (1963).